BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re:

Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network Affiliates

MM Docket No. 95-92

COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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October 30, 1995

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INTV urges the FCC to retain most of the existing network affiliate rules in their present form. The tremendous changes now taking place in the television industry, have not changed the fundamental relationships between the established networks and their affiliates.

There has been no diminution of network power with respect to local affiliated stations. Due in large measure to relaxation of several FCC rules, new vertically integrated network/studio combinations are becoming commonplace in television broadcasting. All the networks have increased their "in-house" production capabilities. Because the networks will have a financial interest in network programs as well as programs placed in syndication, there will be increased pressure to clear network owned programs. As a result, network pressure on affiliates to clear programs will increase, not decrease, in the future.

The network rules go to the very heart of this nation's television system – local control of programming. The Commission should not lose sight of the fact that it is the local station, not the network, which is responsible for meeting the needs of its community. Accordingly, the FCC should:

- Retain the right to reject rule. This rule is the cornerstone of our local television system. The FCC's attempt to modify the rule preventing stations from preempting programs solely for "financial" reasons not only undermines this rule, but is unworkable in the real world.

- Prohibitions on network time option arrangements should remain in place. The advanced notification proposal has been tried in the past and did not work. In today's marketplace, stations need more than a year's notice to find replacement programs if the network's option is not exercised. Time optioning by the established networks could effectively crush the new and emerging networks by preventing secondary affiliations.

- The exclusive affiliation rule should remain in place in all television markets. Eliminating this rule could prevent the development of new networks and severely restrict local programming choices.

The FCC should carefully consider the proposed changes to the network territorial exclusivity rule and the dual network rule.

- The geographic zone of the network territorial exclusivity should be expanded throughout a local station's Designated Market Area (DMA). This zone more accurately reflects marketplace realities.
- The first part of the territorial exclusivity rule should remain in place. If a local affiliate does not clear a network program, then that program should become available to other stations in the market. Absent this rule, consumers may be denied access to network programs.
- The dual network rule should remain in place at this time. Eliminating this rule could impair the development of new emerging networks. The FCC should revisit this issue as we move towards the development of advanced digital television.

INTV believes that a local television station should be the ultimate arbiter of programming that is broadcast in its community. There are no sound public policy reasons for limiting a local television station's editorial discretion in the selection of programming.

Before the
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Comments of the Association of Independent Television Stations, Inc.

I. Introduction

The Association of Independent Television Stations, Inc., (INTV) hereby files the following comments in the above captioned proceeding. As a representative of local television stations across this nation, INTV has a vested interest in this debate. The overwhelming majority of our members are affiliated with either the Fox, UPN or WB networks. As the leading trade association representing stations affiliated with the emerging networks, we offer a unique perspective on these issues. INTV believes it is incumbent on the FCC to create a climate which will permit these new affiliates to grow and prosper in the marketplace.

The Commission should remember two fundamental principles as it addresses the issues in this proceeding. First, local programming decisions are at the heart of a station's ability to serve the interests and needs of its local community. "Localism" has been a bedrock government policy since the inception of television. Indeed, Section 307(b) of the Communications Act requires the Commission to regulate with an eye towards local service. Local television stations, not national programming services, should be the FCC's primary concern.

Second, the financial health of a local television station in today's highly competitive video marketplace is directly related to the ability of each individual station to make economic decisions at the local level. Local off-air television stations face enormous competitive challenges from alternative video distribution systems such as cable, direct satellite broadcasting, MMDS and new telephone video systems. Given these challenges, government policy should be directed towards increasing a local station's options. It should not be geared to increasing the power that network program suppliers have over local stations.

These fundamental principles are the cornerstone of the American broadcasting system. For over a half century, local stations have developed a unique combination of nationally distributed and locally controlled programming. The network affiliate rules are an integral part of this foundation. They should not be sacrificed on the altar of deregulation. These rules do not involve the government's micro-managing of business relationships. Rather, they are the basis for creating the unique partnership between local stations and national program distributors.

II. The Networks Continue to Dominate the Affiliate Relationship.

The FCC postulates that the network-affiliate relationship has undergone fundamental change, arguing that the affiliates are now in a superior bargaining position relative to the networks. In part, this position has been fostered by the unprecedented number of affiliation switches that have taken place in recent years.[1]

INTV believes the FCC has misconstrued the nature and scope of these changes. The recent spate of affiliate switches does not represent a fundamental shift in economic leverage between local television stations and network program suppliers. Rather, affiliate shifts were the result of one network's infusion of capital into a large group owner. It was the Fox network's desire to increase its portfolio of VHF stations that triggered the affiliate changes.[2] The remainder of the affiliate switches were a direct result of this one transaction. The affiliation scramble that followed was nothing more than an attempt by the networks to secure and strengthen affiliations with the largest, most powerful stations in each market.[3] The networks

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[1]At this stage of their development the UPN and WB networks are not in the same position as the major, established networks. Moreover, the existence of these emerging networks does not increase the bargaining position of local stations when it comes to negotiating affiliate contracts with the more established networks.

[2]*Broadcasting & Cable* accurately depicted deals that triggered the affiliate switches:

> The dominoes have only begun to fall.
>
> The big three networks and network affiliates across the country began scrambling to repair the damage done to them last week by the unprecedented affiliation agreement between News Corp's Fox Television and New World Communications Group...
>
> To seal the deal, Fox will give New World $500 million -$250 million for preferred stock at a slight premium over last week's price and $250 million in a seven year interest-free loan... .
>
> New World also will receive time on the Fox owned stations for its syndicated programming... . New World subsidiary Genesis is expected to supply some of the programming.
>
> New World also has a minimum order from the Fox network for two series pilots and two made-for-TV movies.

Broadcasting & Cable, Fox & the New World Order, May 30, 1994 at 6.

[3]For example, in response to the Fox-New World deal, CBS and Westinghouse formed an alliance - setting the stage for an eventual merger.

> In a single deal, CBS and Group W locked up affiliation agreements in five

were the catalysts for these changes. It was not the result of new found leverage by local stations over their network program suppliers.[4] Furthermore, while the networks were able to lure affiliates into long-term affiliation agreements with increases in network compensation, they also were able to lock those affiliates into much more onerous affiliation agreements.[5]

Indeed, the economic clout of the major networks over their local affiliates will increase in the future. Several changes in the economic and regulatory structure of the networks will accelerate this process.

First, elimination of the financial interest and syndication rules will shift the economic focus of the traditional off-air broadcast networks.[6] Mergers between program producers and the networks are fast becoming the order of the day. The proposed Disney/ABC merger is a

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> markets, formed a new station buying group, merged their sales teams and created a programming and distribution partnership.

Broadcasting & Cable, July 18, 1994 at 14.

[4]As Broadcasting & Cable reported:

> Low-rated UHF Fox affiliates should start worrying about losing their affiliation, said Rupert Murdoch, Fox Inc. chairman, last Wednesday at the Television Critics Association press tour in Los Angeles.
>
> "If you're a UHF stations that's weak, you should worry," he said. The network is in discussions in "dozens of markets" for possible affiliation changes, he said.

Broadcasting & Cable, Murdoch Warns Weak UHF Affiliates, July 18, 1994 at 15.

[5]"In this same vein, the terms of the networks' agreements with their affiliates have become progressively more restrictive... In compensation for the longer terms, the affiliates receive higher compensation rates for broadcasting network programming. Part of this same quid pro quo, however, gives the networks expanded rights to terminate an affiliate should the station "preempt the network feed" more than a minimum number of time without prior network approval, or if the station declines an entire program series. Some contracts now make approval for preemption more difficult, and condition compensation rates or series availability on affiliate preemption behavior." Williamson, Oliver E. and Glen A. Woroch, *"A Comparative Efficiency Analysis of the FCC's Prime Time Access Rule,"* filed in MM Docket No. 94-123, March 7, 1995 at 9.

[6]*Report and Order, Review of Syndication and Financial Interest Rule*, MM Docket No. 95-39, FCC 95-382, (September 6, 1995)

case in point. Also, Westinghouse, which has a major production and syndication arm, is in the process of acquiring CBS.[7] In addition, it is quite clear that all of the major networks have become, or are in the process of becoming, major "in-house" program producers for their own networks.

These new network/studio combinations dramatically alter the economic forces that drive network behavior. As traditional broadcast networks, the network's sole incentive was to package national audiences for advertisers. The networks, in effect, were "middlemen," licensing product for distribution through their nationwide system of local off-air affiliates. In this system, the networks' fundamental objective was to make sure that local affiliates "cleared" network programming. Clearing network programming throughout the nation was essential for the networks to guarantee advertisers that their messages would be seen in all markets. Given these incentives, the Commission felt it necessary to enact a package of rules protecting local affiliate autonomy with respect to programming decisions.

The merger between the networks and major production houses, as well as the increase in the "in-house" capabilities of the networks, changes this situation dramatically. Not only will networks be concerned with clearing programs to meet their national advertising commitments, but now the networks will have a financial stake in the programs themselves. As a result, there is even greater pressure to make sure network programs -- which they now own or in which they have a financial interest -- are cleared by their affiliates. Clearing these shows becomes critical if a particular program is to become successful enough to become valuable in syndication. Accordingly, the desire of a network to override its affiliate's ultimate programming choices increases exponentially.

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[7]INTV does not oppose either the Disney/Capital Cities-ABC or the Westinghouse/CBS acquisitions. These acquisitions are a natural outgrowth of the eliminating the financial interest and syndication rules. Indeed, Fox is an example of the new studio/network combinations. Yet the FCC must recognize that these vertically integrated combinations will forever change the network affiliate relationship -- giving the networks more power over local stations.

Apart from the desire to clear "network" programs which are part of the "network" feed, elimination of the financial interest and syndication rule will increase the network's pressure on affiliates to clear network-owned programs in other day parts. It is no secret that the networks, as program producers, are creating and distributing first run syndicated programs.[8] There is no question that affiliates will be under increasing pressure to broadcast network-owned syndicated programming in the future.

The opportunity for a network to exert leverage over its affiliates was has been increased by the FCC. Until this August, local affiliates were guaranteed that at least one hour of prime time would be left to the station to program. With the elimination of the Prime Time Access Rule, the Commission gave the networks an additional hour of prime time in which to clear programming.[9] This could come in the form of an extended "network feed" or in the clearing of new network-owned syndicated programs.

A second major change in the affiliate network relationship involves the rapid development of wire line and satellite delivered services. In other proceedings, the Commission has taken great pains to recognize the development of these services as a justification for deregulating various rules. In the context of the existing network affiliate rules, however, these alternative video delivery systems provide an additional justification for keeping these rules. As

[8]For example, Westinghouse and CBS have launched a new program for early fringe. Also, NBC "is moving aggressively to take equity in major syndicated series and daytime programming." *Electronic Media*, October 9, 1995 at 3.

[9]*Report and Order; Review of the Prime Time Access Rule*, MM Docket No. 94-123, FCC 95-314, July 31, 1995.

the networks become more immersed in program production, there will be an increasing incentive to look for alternate non-broadcast video systems to distribute their product.

Several years ago, the FCC relaxed the network-cable cross-ownership rules, allowing networks to own cable systems reaching ten percent of all homes passed nationally and up to 50 percent of the homes passed in each local market.[10] Congress is contemplating eliminating the broadcast cable-cross ownership rule which will open the door for the network acquisition of cable systems. Apart from actual cable ownership, some of the networks are already have significant ownership in cable networks.[11] With the rise of direct satellite systems the networks could transmit their programs directly to consumers. The much heralded entry of telephone companies into the video business could also provide an avenue for the networks to distribute programming.

The growth of these alternative video distribution systems will give new network/studio combinations a means of reaching the American public that bypasses traditional local off-air television stations. The rise of these alternatives means that local off-air television stations will have a reduced bargaining position in future negotiations with their own networks. Over time, the growth competitive distribution systems will actually increase the power of the network/studio combinations over their local broadcast affiliates. Stations that preempt programming or do not agree with their own network policies may find their own network distributing programming on these systems.

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[10]*See* 47. C.F.R. Section 76.501 (a)(b).

[11]For example, the new Disney/ABC combination gives that company an ownership interest the following cable channels: ESPN, the Disney Channel, Lifetime and the Arts and Entertainment network. NBC owns CNBC, the America's Talking network and has an ownership interest in Court TV. Fox owns the fX cable channel. *Broadcasting & Cable,* August 7, 1995 at 6-7. A combined Westinghouse/CBS would have a long -term revenue sharing arrangement with the Nashville Network, a one-third interest in Country Music Television, a majority ownership in Home Team Sports and production and licensing arrangements with the Arts and Entertainment Network, the Travel Channel and the Disney Channel. *Broadcasting and Cable,* August 7, 1995 at 7, 21.

The history of network affiliate relations reveals that a network's control over an affiliate in a particular market is directly related to the presence of comparable television stations in that market. In these markets, a network is able to tell an affiliate that if it preempts too many programs or demands too much compensation, it will switch its affiliation to another television station. There is every reason to believe that this strategy will continue – only this time with the new distribution systems which compete directly with the local off-air television stations.

Finally, the Commission has embarked on a systematic policy to eliminate many of the rules regulating network behavior. For example, the FCC has proposed repealing rules which prohibit the estsablished networks from representing their affiliates with respect to advertising rates for non-network time periods.[12] Also, the FCC has proposed to eliminate the requirement that network affiliation agreements be filed at the Commission.[13] Moreover the FCC has already eliminated the network station ownership rule (47 C.F.R Section 658(f)) and the "secondary" affiliation rule (47 C.F.R. Section 658(l)).[14]

Taken together, these fundamental structural and regulatory changes will result in increased power for the new network/studio combinations. Now is not the time to eliminate those rules which give a local station the opportunity to decide which programs its community wants.

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[12]*Notice of Proposed Rulemaking, Review of Rules Governing Broadcast Television Advertising,* MM docket No. 95-90, January 12, 1995).

[13]*Notice of Proposed Rule Making, Amendment of part 73 of the Commission Rules Concerning the Filing of Television Network Affiliation Contracts,* MM Docket No 95-40, April 5, 1995)

[14]*Report and Order* in MM Docket No. 92-221 (March 7, 1995).

III. The FCC Should Retain Several Affiliate Rules.

Three rules are critical to retaining local control over programming in local markets. The right to reject rule; prohibitions on time optioning; and the exclusive affiliation rule are central to creating the unique local/national structure of the television industry.

These rules should not be considered individually, but as a package. With respect to the right to reject, time optioning and exclusive affiliation rules: the whole is greater than the sum of its parts. As the FCC noted when implementing its Chain Broadcasting Rules, these rules were designed to address interrelated network practices.

> But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly.[15]

A network's relationship with its affiliate does not operate on an individual issue by issue basis. All of these issues combine to define the relationship that exists between a network program supplier and its affiliate.

Importantly, these rules do not involve the FCC in micro-managing the programming on individual stations or the network itself. Instead these rules help retain the delicate balance between national program suppliers and local stations. This balance has worked for over 40 years, creating an off-air television system that is the envy of the world.

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[15]*National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 197 (1943) *citing Chain Broadcasting Report* at 75.

A. The Right To Reject Rule Should Not Be Modified

Title 47 C.F.R. Section 658(e) is in many respects the cornerstone of the American broadcasting system. It vests in local stations the ultimate responsibility for the programming that is broadcast to the American people.[16]

Emanating from the FCC's *Chain Broadcasting Report*, the right to reject rule was in effect before the inception of television. Nevertheless, its age does not undermine the fundamental principle – local program control – on which the rule is based. When upholding the right to reject rule the Supreme Court cited with approval the FCC's establishment of this core principle.

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.[17]

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[16] 47 C.F.R. Section 73.658 (e) reads:

(e) *Right to Reject Programs.* No license shall be granted to a television broadcast stations having any contracts, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from:

> (1) Rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or
>
> (Substituting a program which, in the station's opinion, is of greater local or national importance.

[17] *National Broadcasting Co., Inc v. United States*, 319 U.S. 190, 205-206.

While the bedrock right to reject programs was first established in radio, its applicability to television was found to be equally compelling.[18]

Until this proceeding the Commission has never questioned this bedrock principle as applied to television. On the contrary, the concept that a station, not a programmer, should have the ultimate right to control programs has been engrafted onto other Commission rules. Perhaps the most recent formulation of this concept involves LMAs. In evaluating these arrangements, the FCC requires that a station that offers time on its station to other stations in its market must be ultimately responsible for the programs that are broadcast. If the Commission believes it can now eviscerate this concept, it should do so in the LMA context as well.

The *Notice* proposes to change this rule, preventing stations from invoking the rule "solely" for financial considerations. Superimposing a "financial test" on a station's ability to reject network programming contravenes years of FCC policy and is unworkable in the real world.

Both the FCC, Congress and the courts have long recognized that licensee discretion in program selection is paramount. The Supreme Court articulated this fundamental precept in *Columbia Broadcasting System Inc. v. Democratic National Committee*:

> More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.[19]

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[18] *See Report of the Network Study Staff (Barrow Report)*, H. Rep. No. 1297, 85 Cong., 2d Sess. 125 (1958)

[19] *Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 120 (1972)*

The financial test envisioned by the FCC's proposed right to reject rule conflicts with this basic principle. A local station should not have to justify to the network its decision not to clear certain network programs. This is especially true in cases where the replacement program happens to be more financially advantageous to the local station. Bearing such a burden is the antithesis of local editorial discretion.

> [If] the licensee is not allowed to reject a program unless he can prove to the satisfaction of the network that he can obtain a better program, his efforts to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course.[20]

Indeed, this fundamental policy was restated by the Commission in 1977 when it addressed the network rules in the context of radio.

> Also, regardless of the length of such [affiliate] agreements, affiliates should always remain free not to broadcast network programming – either commercial or non-commercial....Networks also should not infringe on the licensee's ability to choose programming from other sources such as other networks.[21]

Apart from undermining fundamental communications policy, the proposal contained in the *Notice* is unrealistic. The *Notice* proposes that stations could not reject network programs "solely" for financial reasons. Presumably, a station could reject a network program for other public interest reasons, even in situations where the replacement program yielded more revenue for the station than the network program. Nevertheless, such a distinction will be unworkable in the real world. Any time a station decides to reject network programming, the Commission could become involved in determining whether the program was rejected for financial as opposed to other public interest reasons.

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[20] *Report on Chain Broadcasting*, Doc No. 5060, May 1941 at 66.

[21] *Report and Order, Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations*, 63 F.C.C. 2d, 674, 690 (1977).

In many instances, the replacement program might yield more revenue to the station. After all, non-network replacement programs usually have more local advertising availabilities for a station than network programming. Moreover, replacement programs with tremendous local appeal are likely to provide a station with high ratings.

How would the FCC resolve such disputes? Apparently, affiliated stations would be required to provide information comparing the revenues obtained from the replacement program to the revenues that would have been obtained from running the network's program. Moreover, if a station offered "other" reasons for rejecting the program, the FCC would presumably investigate the validity of these claims.

In effect, the *Notice* places the burden on the local station to demonstrate that financial considerations were not the reason for rejecting a network program. The *Notice's* limitation that financial considerations cannot be the "sole" reason for rejecting these programs does not resolve the fundamental factual disputes that could arise under this test.

There is no question that the *Notice's* proposal will have a chilling effect on a station's ability to reject network programs. Apart from the network's pressure to clear a program, the potential for an intrusive and expensive Commission inquiry will, by itself, chill editorial discretion.

Finally, the Commission must recognize that under the present rules, local affiliated stations clear approximately 98 percent of all network prime time programs. The FCC is not confronted with a situation where affiliates are destroying the network business by refusing to carry programs.[22] The present rule has worked well for over forty years. As noted previously,

[22]Even if clearance rates were not that high, the FCC primary concern should be with local stations and not with network program suppliers.

new affiliate agreements exact stiff penalties for not clearing programs. There is simply no need to exacerbate this problem by increasing the power of the networks.

B. The Time Optioning Rule Should Be Retained

The current "option time" rule prevents a network from locking up a station's schedule during time periods for which it does not provide network programming.[23] The *Notice* proposes to modify the time optioning prohibition and permit networks to enter into optioning agreements, subject to some reasonable advanced notice to a station if the network decides not to exercise the "option." The *Notice* also proposes to eliminate the rule.

This rule should neither be revised nor eliminated. From a station's perspective, eliminating the rule means a loss of editorial discretion. When addressing this issue the Commission concluded:

> By restricting the licensee's freedom of choice, the option-time practice represents, accordingly, an abdication of his duty to program his station as he deems most in the public interest.[24]

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[23]47 C.F.R. 73.658 (d) reads:

> (d) *Station commitment of broadcast time.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with any network organization, which provides for optioning of the station's time to the network organization, or which has the same restraining effect as time optioning. As used in this section, time optioning is any contract, arrangement or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[24]*Report and Order, Modifying Option Time and the Station's Right to Reject Network Programs*, 34 F.C.C. 1103, 1128 (1963)

This position was echoed by the Commission in 1977 when the Commission examined the issue with respect to radio.

> Similarly, networks should not place unreasonable restraints on licensee independence through excessive use of options on station time in advance of scheduling particular programming to fill the time...[25]

The Commission must understand that a network occupies a unique position with respect to a local affiliated station. As an affiliate's leading program supplier, a network can exert considerable influence over the station. It is a fairly simple task for a network to leverage this position to secure time slots on an affiliate during time periods when the network is not providing "network" programming.

The proposed "advanced notice" requirements will not attenuate the network's leverage. As the *Notice* indicates, an advanced notification period was tried previously by the Commission and was found wanting. Resurrecting this approach will not work in today's programming marketplace. If a network decided not to exercise its option, stations would have to look to the syndication market for replacement programs. In a highly competitive programming market, stations often have to purchase syndicated programs a year or two in advance of the actual broadcast date. As the Commission observed in its PTAR decision, top quality off-network programs are often sold two years in advance.[26]

Given this environment, affiliated stations will be placed at an enormous disadvantage if their network contracts to option time and then decides not to program the time period. There is simply no way for a station to acquire top quality replacement shows. In order to

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[25] *Report and Order*, 63 F.C.C. 2d at 690.

[26] *Report & Order; Review of Prime Time Access Rule*, MM Docket No. 94-123, FCC 95-314, July 31, 1995, at 58 n.231. This trend continues, top off-network syndicated shows such as "Frazier" and "Grace Under Fire" are being sold in 1995 for a fall 1997 broadcast date. *Broadcasting and Cable*, September 18, 1995 at 31.

give stations ample time to secure replacement programs, the notification period would have to be a year or two in advance of the proposed "option" date.

The FCC must also consider the impact time optioning will have on competitive program suppliers. With time optioning, the established big three networks could effectively squeeze out other programmers with time optioning arrangements. By leveraging their network line-up, the networks are in a unique position to secure additional "non-network" time slots from their affiliates. Concerns about squeezing out non-network program suppliers were important considerations when the FCC adopted the current time optioning rule.[27]

These concerns are particularly relevant today. First, repeal of the financial interest and syndication rule has created new network/studio combinations. As program producers, these new combinations will be looking for outlets to exhibit both first run programs as well as off-network programs that have been placed in syndication. As a recent edition of *Electronic Media* observed, finding open time slots on stations will become more difficult in the near future.

> But several syndication executives now predict this fall's tally [number of new syndicated shows] represents a high-water market, unlikely to be reached again.
>
> The threat of the station and supplier alliances that already exist, and those still to come, is likely to keep many future series ideas in the minds of their creators or, failing that, on the sidelines due to clearance troubles, many say.
>
> That's already in evidence this fall, as only three of the 69 new shows to premiere come from the half-hour strip format, when that used to be the major inroad to syndication's access pot of gold.
>
> Many executives predict that alliances will most affect access, early fringe and, to a certain extent, late-night, leaving daytime and weekend clearances about all that left.[28]

Time optioning by networks places independent program syndicators at a competitive disadvantage. These independent suppliers sell to stations on a program by program basis.

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[27] *Report and Order, Time Optioning Order*, 34 FCC 1103, 1128 (1963).

[28] *Electronic Media*, September 4, 1995 at 39.

Each program must stand up, by itself, in the competitive marketplace and obtain clearances on local stations. Network time option arrangements can distort this marketplace, as the networks link station affiliations to the clearance of network owned syndication programs. Time optioning is the perfect vehicle to lock up the remaining time slots on affiliates and foreclose access to independent programmers.

Time optioning by the established networks can also effectively foreclose opportunities for new, emerging networks. In many instances, these new networks rely on "secondary" affiliates to clear programming on stations in many markets.[29] Time optioning by the established networks, however, can effectively prevent their own affiliates from obtaining secondary affiliations with the new, emerging networks. If the current time optioning rules are eliminated, the established networks can effectively prevent the establishment of new network competition by locking up time slots on their affiliates.[30]

C. The Exclusive Affiliation Rule Should Be Preserved

The exclusive affiliation rule 47 C.F.R. Section 73.658(a), is essential to maintaining local stations' independence.[31] The *Notice* itself recognizes that the rule may be important in smaller

[29]The WB network in particular relies on secondary affiliates. In many markets these secondary affiliates run WB network programming "out of pattern." In other words, the affiliate time shifts WB programs to hours when the station's primary network is not providing network programs.

[30]Indeed, time optioning can be used to circumvent the exclusive affiliation rule. If the FCC believes that the exclusive affiliation rule should be retained, then the time optioning rule should likewise be retained.

[31]Section 73.658(a) reads:

> (a) *Exclusive affiliation of stations.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

markets. INTV respectfully submits that the rule should be retained in all markets. The rights granted to affiliates should uniform and not segmented based on market size.

The FCC should not forget the genesis of this rule. The original *Report on Chain Broadcasting* grew out of a dispute between the NBC and CBS networks and their affiliates over the 1939 World Series -- which was offered by the Mutual Radio Network. The Supreme Court accurately recited the problem that resulted in Commission action.

> The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939, Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, an as a result, thousands of persons in many sections of the country were unable to hear the broadcasts of the games.[32]

Exclusive affiliation is not simply a 1930s problem. In the 1990s the issue has resurfaced in at least two instances. The first situation arose when Fox obtained the rights to NFL games. There are numerous examples of Fox attempting to secure secondary affiliations with ABC and CBS affiliates.[33] Without the exclusive affiliation rule, these networks would have been able to block these affiliations.

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[32] *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 199 (1943)

[33] Electronic Media reported the problem:

> ABC, CBS and their affiliates are involved in an intense standoff centering on NFL football, the World Series and "60 Minutes."
>
> Seeking to improve its national coverage, FBC has been using its package of National Football Conference Sunday afternoon games and playoffs to lure ABC and CBS affiliates into secondary affiliations....
>
> ABC and CBS are fighting to keep their affiliates from signing secondary affiliations with FBC in roughly 65 markets that don't have a primary FBC affiliate.

Electronic Media, April 11, 1994 at 1.

A second example involves the formation of the new UPN and WB networks. Both of these networks depend on secondary affiliations to gain critical national audience reach. Without these secondary affiliations, these new networks would have an extremely difficult time becoming competitive. Unfortunately, Fox has tried to prevent its affiliates from entering into secondary affiliations.

These examples demonstrate that the current exclusive affiliation rule is critical to the development of new networks. Moreover, the rule fosters competition between the networks. If a station is not happy with its own network's programming, then it has the ability to establish a relationship with another network.

The competitive dynamic associated with the FCC's exclusive affiliation rule should be permitted to exist in all markets. While the problem may be most acute in markets with a few television stations, the competitive benefits of the rule also accrue in large markets as well. Stations should have the freedom to choose, and not be bound by "exclusive" contracts that limit their programming choices.

D. The Geographic Zone Of The Territorial Exclusivity Rule Should Be Changed To A Station's Designated Market Area

This rule serves two purposes. First, when a local affiliate does not clear network programming in a particular market, the network can offer that program to other stations in the market. Second, the rule prevents an agreement between a network and an affiliate which precludes a station in another "community" from carrying the network's programs.

The *Notice* proposes to eliminate the first part of the rule. INTV believes this part of the rule should be maintained. Absent the rule, a network and an affiliate could enter into an arrangement whereby certain network programs would not be seen in a particular market.[34] This part of the rule is an integral part of the balance struck between the networks and their affiliates.

For example, suppose a network was broadcasting a post season championship baseball game. The local affiliate then decides to preempt the game in order to broadcast an NFL game involving a local team. With the rule in place, the network could clear the program on another station in the market. Absent the rule, the affiliate, depending on the terms of its affiliation agreement, could prevent the program from being seen.

This scenario may sound far fetched, but it is based on reality. Several years ago a local network affiliate decided not to clear the network's broadcast of a post season baseball game. In its place, the station broadcast a Redskins game. With the rule in place, the baseball game was seen on a local Independent station. If the rule had not been in place, it is possible that the game would not have been aired in the Washington market.

A more recent example of this rule in action involved ABC's award winning "NYPD Blue." Several ABC affiliates refused to clear the program when it was first aired. With the rule in place, this program was able to be seen in many markets on other television stations.

INTV believes that local affiliates should have the exclusive right to broadcast network programs in their market. Nevertheless, if a local affiliate decides to preempt a network

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[34]Obviously, a network has a strong incentive to take programs that have been preempted by its own affiliate and clear them on other stations in the affiliate's market. Given the leverage the networks can exert over their affiliates, it is likely that these programs will be available to other stations in a local market. Nevertheless, there may be a few situations where the network and the affiliate have agreed, in advance, not to clear network programs that have been preempted by the local affiliate. Retaining the first part of the network exclusivity territorial exclusivity rule will prevent this situation from happening.

program, then other stations in the market should have an opportunity to broadcast that program, if they want.

The *Notice* provides no evidence demonstrating that this portion of the rule harms the public. Pushing aside the "efficiencies" rhetoric, this portion of the rule ensures that citizens in local communities retain access to network programs that have been preempted by the local affilliates. Given the strength of the networks, these situations are relatively rare. The rule is necessary, however, to cover those unique circumstances where programs are not cleared.[35]

INTV agrees with the FCC's proposal to modify the second part of the rule governing the geographic zone for network territorial exclusivity. As presently written, the rule prohibits an agreement between a network and its affiliate which prevents a station in another "community" from contracting with the same network. This no longer reflects the reality of the television marketplace.

A local station's market is better defined in terms of a station's Designated Market Area (DMA). The DMA is predicated on actual viewing patterns as opposed to some arbitrary geographic standard. In other contexts both the Congress and the FCC have accepted a similar definition of a local television station's market.[36] This proposal should be adopted.[37]

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[35]Again, this rule has been part of the overall balance that has existed between the networks and their affiliates. It gives the networks a vehicle for clearing programs on a national basis.

[36]In establishing the zone for must-carry rules, Congress defined a local station's market as its ADI, a geographic zone which is essentially the same as a station's DMA.

> The Committee recognizes that ADI lines establish the markets in which television buy programming an sell advertising...The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary based milage definition.

Cable Television and Consumer Protection and Competition Act of 1992, House Rep. No. 102-628, 102nd Cong. 2d Sess, June 29, 1992 at 97.